LEE FU SDN BHD

v.

UNIQUE PROGRESS SDN BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: 11-12-2001]
28 APRIL 2003

CONTRACT: *Claim for moneys owing - Whether claim proven - Whether defendant's defence a bare denial - Whether there was presumption that parties followed established course of business pursuant to s. 114(f) of Evidence Act 1950 - Whether evidence of plaintiff's witnesses hearsay - Whether defendant's accounts amiss - Whether defendant wrongly invoked s. 73 of Contracts Act 1950 - Whether magistrate's decision correct - Evidence Act 1950, s. 114(f) - Contracts Act 1950, s. 73*

CIVIL PROCEDURE: *Interest - Judgment debt - Commencement date for interest - Whether magistrate erred in awarding interest from date of demand instead of date of judgment - Civil Law Act 1956, s. 11*

CIVIL PROCEDURE: *Costs - Discretion of trial court - Whether counterclaim a separate cause of action - Whether successful party entitled to costs - Whether magistrate erred in awarding costs to plaintiff in dismissing defendant's counterclaim*

This was an appeal by the defendant against the learned magistrate's decision allowing the plaintiff's claim in the sum of RM18,444.90 with interest at 8% p.a. from the date of the notice of demand together with costs of RM2,828, and dismissing the defendant's counterclaim with costs of RM3,075. The plaintiff, a dealer in motor vehicle spare parts, had a business relationship for more than ten years with the defendant, which ran a lorry transportation business. The plaintiff had extended to the defendant credit terms for the spare parts ordered by the defendant, and for sales and deliveries, the plaintiff would render invoices to the defendant; it would then acknowledge receipt and the plaintiff would retain a copy thereof. However, the issue of contention in the plaintiff's claim and the defendant's counterclaim were several invoices that had not been signed by the defendant.

The learned magistrate held that the plaintiff had succeeded in proving its case on a balance of probabilities and that the defendant's defence that it had neither ordered nor received the spare parts stated in those unsigned invoices was a bare denial as, on the facts, the statements of account, invoices and receipts

were sent by the plaintiff at the end of each month, to which the defendant had never raised any objections but had instead made lump sum payments. The issues that needed to be resolved were whether the learned magistrate was correct in: (1) allowing the plaintiff's claim and dismissing the defendant's counterclaim; (2) awarding interest at 8% p.a. from the date of demand as opposed to the date of judgment; and (3) awarding costs to the plaintiff in dismissing the defendant's counterclaim.

Held:

[1] The evaluation of the evidence showed that the plaintiff had established its claim against the defendant whereas the defendant had failed to discharge both the legal and evidential burden of proof with regard to its counterclaim. (p 178 a-b)

[1a] Section 114(f) of the Evidence Act 1950, which was relied upon by the defendant, appeared to militate against the defendant's case because there was a presumption that the course of business established in this case had been followed by the parties. (p 178 e-g)

[1b] The evidence of the plaintiff's three witnesses who had been cross-examined in a full trial in the court below was not hearsay and was correctly admitted by the learned magistrate. (pp 178 i - 179 a)

[1c] The defendant's shift of position on the amount in the counterclaim gave rise to the irresistible inference that there was something amiss in the accounts of the defendant, or that at least there was an element of ambivalence. (p 179 f-g)

[1d] The defendant's defence and counterclaim were based on the allegation that it neither ordered nor took delivery of the spare parts in respect of the unsigned invoices. However, the defendant then invoked s. 73 of the Contracts Act 1950, which was the statutory formulation of an action for money had and received which was based on quasi-contracts or restitution; this was a different cause of action which was separate and distinct from the nature, quality and substance of the transactions between the plaintiff and the defendant *viz.* for goods sold and delivered. (p 179 h - 180 a-b)

[1e] Upon perusal of the entire appeal record, the learned magistrate had arrived at a correct finding of facts on a balance of probabilities in allowing the plaintiff's claim and dismissing the defendant's counterclaim. (p 180 c)

[2] In awarding interest from the date of demand, the learned magistrate may have had in mind s. 11 of the Civil Law Act 1956 which provides for the power or discretion of the court to award interest on, for example, a debt between the date when the cause of action arose and the date of judgment. Therefore, the learned magistrate had not erred in the exercise of discretion in awarding the interest at 8% p.a. from the date of demand, which was the date of the accrual of the cause of action, to the date of judgment, when dismissing the defendant's counterclaim. (p 181 a & c)

[3] A counterclaim is a separate cause of action but tried together with the principal claim in order to avoid duplicity or multiplicity of proceedings. Costs are at the discretion of the court and generally follow the event *ie*, the successful party is entitled to be paid his costs. Therefore, the learned magistrate had not erred in awarding costs to the plaintiff. (p 181 a-h)

[Appeal dismissed.]

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Appeal [1995] 3 CLJ 639 CA ***(refd)***

Alliedbank (Malaysia) Bhd v. Yau Jiok Hua [1998] 6 MLJ 1 HC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Chell Engineering v. Unit Tool & Engineering Co [1950] 1 All ER 378 ***(refd)***

Chia Yan Tek & Anor v. Ng Swee Kiat & Anor [1997] 4 CLJ 535 CA ***(refd)***

Laksamana Realty Sdn Bhd v. Yeo Tin Sang [1998] 5 CLJ 347 HC ***(refd)***

Leong Hoong Khie v. PP [1986] 2 CLJ 291; [1986] CLJ (Rep) 179 FC ***(refd)***

Malaysian National Insurance Sdn Bhd v. Malaysia Rubber Development Corporation [1986] 2 MLJ 124 SC ***(refd)***

MGI Securities Sdn Bhd v. Teong Teck Leng & Ors [2000] 5 CLJ 163 HC ***(refd)***

New Zealand Insurance Co Ltd v. Ong Choon Lin [1992] 1 MLJ 185 SC ***(refd)***

Petroleum Nasional Bhd (Petronas) & Anor v. Cheah Kam Chiew [1987] 1 MLJ 25 SC ***(refd)***

Renal Link (KL) Sdn Bhd v. Dato' Dr Harnam Singh [1997] 3 CLJ 225 CA ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Subramaniam v. PP [1956] 22 MLJ 220 ***(refd)***

Tan Chow Soo v. Ratna Ammal [1969] MLJ 49 ***(refd)***

Teper v. R [1952] AC 480 ***(refd)***

The London, Chatham Eastern Rly Co [1893] AC 429 ***(refd)***

Wan Salimah Wan Jaafar v. Mahmood Omar (Anim Abdul Aziz, Intervener) [1998] 1 CLJ 480 HC ***(refd)***

Wong Chong Chow v. Pan-Malaysian Cement Works Bhd [1980] 2 MLJ 75 ***(refd)***

Wong Siew Choong Sdn Bhd v. Anvest Corp Sdn Bhd [1999] 3 738 CLJ FC ***(dist)***

Legislation referred to:
Civil Law Act 1956, s. 11
Contracts Act 1950, s. 73
Evidence Act 1950, ss. 101, 102, 114(f)
Subordinate Courts Rules 1980, O. 29 r. 12, O. 48 r. 3

Other source(s) referred to:
Pollock & Mulla, *Indian Contract And Specific Relief Acts*, 10th edn, p 598
Malaysian High Court Practice, 1998 Desk Edn MLJ, pp. 333, 334

For the defendant - Low Kiang Kiau; M/s Low & Lee
For the plaintiff - Moi Teik Seng; M/s Moi Teik Seng & Partners

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Appeal

The matter before me is the appellant-defendant's ("defendant's") appeal against the decision of the learned magistrate who had on 30 March 2001 allowed the respondent-plaintiff's ("plaintiffs") claim in the sum of RM18,444.90 with interest at 8% p.a. from 11 July 1998 ie, the date of the notice of demand and costs of RM2,828 and dismissed the defendant's counterclaim with costs of RM3,075.

Some questions of law appeared to have been raised for decision in this appeal.

Facts Of The Case

The plaintiff is a dealer in motor vehicle spare parts, while the defendant carries on lorry transportation business. They have a business relationship of more than 10 years, based on a running account in which the plaintiff has extended to the defendant credit terms for the spare parts ordered by the defendant either by telephone or through the defendant's employees who would take delivery thereof if the stocks were available, otherwise the plaintiff or the plaintiff's employees would deliver them to the defendant.

For the sales and deliveries, the plaintiff would render to the defendant invoices, and the defendant or the defendant's employees would acknowledge receipt, after which the plaintiff would retain a copy thereof. There was evidence which established that several invoices have not been signed by the defendant or the defendant's employees and this, as explained by the plaintiff's witnesses, was due to the fact that the defendant's workers were otherwise engaged at the time of the delivery but who undertook to sign them subsequently.

The defendant's version was that the spare parts stated in those unsigned invoices were neither ordered nor received by the defendant, although defendant's witnesses have confirmed the above mode of transactions between the plaintiff and the defendant.

It was also established for the defendant that the defendant did receive official receipts, monthly statements of account and invoices from the plaintiff and lump sum payments were made by the defendant, but not with particular reference to specific invoices.

The plaintiff would credit all these payments into the defendant's running account, which had been established on mutual trust and confidence, in order to arrive at an outstanding balance.

DW2 who was the person in the defendant's company taking charge of maintaining the defendant's accounts was unable to testify if the defendant has ever made any excess payment to the plaintiff.

That was indeed the finding of facts by the learned magistrate who held that the plaintiff has succeeded in proving its case on a balance of probabilities and that the defence was a bare denial, as the statements of account, invoices and receipts were sent by the plaintiff to the defendant at the end of each month, to which the defendant had never raised any objection or dispute but had instead made lump sum payments.

Submission For Defendant

En. Low Kiang Kiau, learned counsel for the defendant, asked this court to decide whether the learned magistrate was correct:

1. in allowing the plaintiff's claim and dismissing the defendant's counterclaim?
2. in awarding interest at 8% p.a. from the date of demand ie, 11 July 1998, as opposed to the date of judgment? and
3. awarding costs in dismissing the defendant's counterclaim?

He submitted that the defendant did not owe the plaintiff the sum claimed but instead the defendant has wrongly paid the plaintiff RM61,929 and hence the defendant's counterclaim for RM43,484.10, which was limited to RM25,000 to bring it within the jurisdiction of the magistrate's court. He stressed that the defendant has neither ordered nor received the spare parts amounting to the sum claimed by the plaintiff.

He contended that the absence of acknowledgment of receipt by the defendant or the defendant's employees in some 52 invoices meant that the defendant has neither ordered nor received the spare parts, and in this respect he relied on *Wong Siew Choong Sdn Bhd v. Anvest Corp Sdn Bhd* [1999] 3 CLJ 738 FC.

He added that under s. 102 of the Evidence Act 1950 the burden of proof is on the plaintiff to establish its case, citing *MGI Securities Sdn Bhd v. Teong Teck Leng & Ors* [2000] 5 CLJ 163 HC, in support.

It was argued that the plaintiff has not complied with the agreed practice of obtaining acknowledgment of receipt in all invoices upon delivery in order to avoid disputes. Section 114(f) of the Evidence Act 1950 was relied on by the defendant.

It was also canvassed that the evidence adduced for the plaintiff was hearsay as none of the witnesses knew of the delivery of the spare parts to the defendant and hence such evidence should not have been admitted on the basis of *Leong Hoong Khie v. Public Prosecutor* [1986] 2 CLJ 291; [1986] CLJ (Rep) 179 FC; and *Malaysian National Insurance Sdn. Bhd. v. Malaysia Rubber Development Corporation* [1986] 2 MLJ 124 SC.

The defendant contended that as there was excess payment by the defendant, under s. 73 of the Contracts Act 1950, the defendant is entitled to repayment.

In relation to question 2, it was stressed that the rate of interest at 8% p.a. should run from the date of judgment ie, 30 March 2001 and not from the date of demand ie, 11 July 1998, as the parties have not agreed on the interest from the date of demand. He added that the plaintiff is estopped from charging the interest, on the basis of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283 FC; and *Laksamana Realty Sdn Bhd v. Yeo Tin Sang* [1998] 5 CLJ 347 HC.

According to the defendant, costs in question 3 should not have been awarded to the plaintiff when the defendant's counterclaim was dismissed as the counterclaim was based on the excess payments and the same documents eg, monthly statements of account, invoices and cheques were used, same witnesses were called and same issues were argued.

Plaintiff's Response

En. Moi Teck Seng, learned counsel for the plaintiff, said that the defendant's original counterclaim was for RM9,344.60 allegedly based on the disputed invoices. That counterclaim was, in the course of the trial in the court below, amended to RM43,484.10 and further limited to RM25,000 on jurisdictional ground. He added that the defendant's counterclaim is untrue and false, being conceived only at the trial.

He added that the defendant's defence did not raise the issue of excess payments on mistaken facts and without consideration as these allegations were not pleaded and so s. 73 of the Contracts Act 1950 has no application.

In response to question 1 above, the plaintiff submitted that the business transactions between the parties were based on trust over the years and that the learned magistrate's finding was based on evidence and facts and an appellate court should be slow in interfering with such finding.

On the issue of hearsay evidence, it was the plaintiff's view that the witnesses for the plaintiff have personal knowledge of the transactions between the plaintiff and the defendant and the invoices together with the spare parts were ordered by the defendant and delivered by the plaintiff in the course of business.

In respect of question 2, it was argued for the plaintiff that the interest at 8% p.a. from 11 July 1998 was reasonable, as the plaintiff was actually entitled to the said interest from 1 May 1998 under O. 29 r. 12 of the Subordinate Courts Rules 1980 and *New Zealand Insurance Co Ltd v. Ong Choon Lin (t/a Syarikat Federal Motor Trading)* [1992] 1 MLJ 185 SC was relied upon.

It was argued for the plaintiff that the plaintiff is entitled to costs in question 3 as "costs follow the event" under O. 48 r. 3 of the Subordinate Courts Rules 1980 and in support thereof, he cited *Petroliam Nasional Bhd. (Petronas) & Anor. v. Cheah Kam Chiew* [1987] 1 MLJ 25 SC.

Decision Of The Court

Plaintiff's Claim And Defendant's Counterclaim

At this juncture, it is appropriate to state that in *Wong Siew Choong Sdn Bhd, supra,* the Federal Court was concerned with two groups of documents, the first of which was impugned as to both their making and contents, and the second as to their contents. The sole issue revolved around the identity of the purchaser who had purportedly purchased some land through an estate agent. It is my specific finding that there seems to be no semblance of facts or issues between that Federal Court case and the present case which is essentially a claim for goods sold and delivered. With respect, I am unable to see any support to be derived therefrom to strengthen the defendant's counterclaim.

Next, s. 102 of the Evidence Act 1950 provides as follows:

> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all was given on either side.

Section 102 is commonly referred to as casting the evidential burden of proof ie, the burden of introducing evidence. It is to be read with s. 101 which casts the legal burden of proof on the plaintiff who desires the court to give judgment as to his legal right or liability, dependent on the existence of the facts which he asserts. That being the case, the plaintiff bears both the legal burden of proof under s. 101 and the evidential burden of proof under s. 102. The issue therefore crystallizes and it is whether the plaintiff has discharged both the legal

and evidential burden of proof. I agree with the evaluation of the evidence by the learned magistrate that the plaintiff has introduced sufficient evidence on a balance of probabilities to establish its claim against the defendant.

On the other hand, in respect of the defendant's counterclaim, the legal burden of proof under s. 101 and the evidential burden of proof under s. 102 are on the defendant. Although the defendant did introduce some evidence, such evidence has been evaluated and rejected by the learned magistrate, in which case, the defendant was held to have failed in discharging both the legal and evidential burden of proof. I am unable to see any error on the part of the learned magistrate in this finding.

Hence, it is clear that s. 102 is unhelpful to the defendant.

In *MGI Securities Sdn Bhd, supra,* from which the defendant seeks assistance, KL Rekhraj, J held, *inter alia,* that pursuant to ss. 101 and 102, the plaintiff bore the burden of proof to prove its case and as the plaintiff elected not to lead any evidence against the second and third defendants, there was no evidence for the court to adjudicate upon. However, in the appeal before me, as alluded to above, the plaintiff has adduced sufficient evidence to support its claim against the defendant.

Section 114(f) of the Evidence Act 1950 was relied upon by the defendant. It gives rise to a presumption that the common course of business has been followed in particular cases. Section 114(f) appears to me to militate against the defendant's case, because the course of business which existed between the plaintiff and the defendant was that the delivery of the spare parts ordered by the defendant was to be accompanied by invoices, the receipt of some of which were acknowledged when the defendant's employees were not otherwise busily engaged, while some were not signed when they were busy. This was subsequently followed up with monthly statements of account to which the defendant had never protested or disputed but instead made lump sum payments thereof. The presumption is that this course of business has been followed by the parties herein.

The rule against hearsay is generally invoked to exclude evidence as proof of a fact which has been stated by a third person who is not called as a witness and cannot be tested by cross-examination: see eg, *Teper v. R* [1952] AC 480 @ 486; *Leong Hoong Khie, supra*; and *Subramaniam v. Public Prosecutor* [1956] 22 MLJ 220 PC.

In the instant case, the plaintiff has adduced evidence through three witnesses who have had direct business transactions with the defendant in person and through defendant's telephone calls and all documents such as official receipts, invoices and monthly statements have been rendered to the defendant. These

witnesses have been cross-examined in a full trial in the court below. I therefore hold that their evidence is not hearsay and has been correctly admitted by the learned magistrate: *Wan Salimah bte Wan Jaafar v. Mahmood bin Omar (Anim bte Abdul Aziz, Intervener)* [1998] 1 CLJ 480 HC; and *AlliedBank (Malaysia) Bhd v. Yau Jiok Hua* [1998] 6 MLJ 1 HC.

More specifically, the finding of fact by the court below is based on the evidence presented before the learned magistrate who is entitled to assess on a balance of probabilities as to where the truth lay: *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [1997] 4 CLJ 535 CA; *Renal Link (KL) Sdn Bhd v. Dato' Dr Harnam Singh* [1997] 3 CLJ 225 CA.

It is trite law that an appellate court will not readily interfere with the finding of facts arrived at by the trial court to which the law entrusts the primary task of evaluation of the evidence, unless the trial court has fundamentally misdirected itself: *Sivalingam a/l Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545 CA; or there was no judicial appreciation of the evidence by the trier of fact, or the audio-visual advantage reserved to the trial court has been missed or the findings made do not accord with the probabilities of the case when taken as a whole: *Renal Link (KL) Sdn Bhd, supra; Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another Appeal* [1995] 3 CLJ 639 CA. None of these exceptions was detected here.

An appellate court is in a far less advantageous position to decide on issue of credibility than the trial court hearing and recording the evidence in full and observing the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment: *Tan Chow Soo v. Ratna Ammal* [1969] MLJ 49 PC.

There are some extraordinary features in the defendant's counterclaim in that it originally stood at RM9,344.60 which was subsequently amended to RM43,484.10 but limited to RM25,000 in order to bring it within the learned magistrate's jurisdiction. This shifting of position by the defendant would give rise to the irresistible inference that there was something amiss in the accounts of the defendant, or at least there was an element of ambivalence. The defendant's accounting staff DW2 was however unable to testify to the excess payments by the defendant.

The defendant's defence and counterclaim were based on the allegation that it did not order and did not take delivery of spare parts in respect of the invoices which were not signed by the defendant or the defendant's employees, but the defendant has now invoked s. 73 of the Contracts Act 1950 which provides as follows:

> A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

In my view, s. 73 is the statutory formulation of an action for money had and received which is based on quasi contract or restitution: see Pollock & Mulla, on *Indian Contract And Specific Relief Acts* 10th edn. p. 598. That is a different cause of action which is separate and distinct from the nature, quality and substance of the transactions between the plaintiff and the defendant *viz.* for goods sold and delivered.

Upon perusing the entire appeal record, I am satisfied that the learned magistrate has arrived on a correct finding of facts on a balance of probabilities, in allowing the plaintiff's claim and in dismissing the defendant's counterclaim.

Interest Awarded From Date Of Demand

Order 29 r. 12 of the Subordinate Courts Rules 1980, cited for the plaintiff, reads as follows:

> Every judgment debt shall carry interest at the rate of 8 per centum per annum, or at such other rate not exceeding the rate aforesaid as the Court shall direct [(unless the rate has been otherwise agreed upon between the parties)], such interest to be calculated from the date of judgment until the judgment is satisfied.

Order 29 r. 12 allows interest from the date of judgment and so does not assist the plaintiff in seeking an award of interest from the date of demand.

In *New Zealand Insurance Co Ltd, supra,* the Supreme Court held, *inter alia,* that the rate of interest would have to be paid on the judgment sum from the date of judgment, and that any interest for any period before the date of judgment may be awarded for having kept a party out of the moneys due to him by way of indemnity under policy of insurance, ie, where there was a contractual payment of interest from the accrual of cause of action up to the date of judgment: see also *The London, Chatham And Dover Rly Co. v. The Southern Eastern Rly Co.* [1893] AC 429 at 437; and *Wong Chong Chow v. Pan-Malaysian Cement Works Bhd.* [1980] 2 MLJ 75 at 78.

In awarding interest from the date of demand, the learned magistrate may have in mind s. 11 of the Civil Law Act 1956 which provides for the power or discretion of the court to award interest on eg, debt between the date when the cause of action arose and the date of judgment. Section 11 reads:

11. Power of Courts to award interest on debts and damages

In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages **for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:**

Provided that nothing in this section:

(a) shall authorise the giving of interest upon interest;

(b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange. (emphasis added)

I therefore hold that the learned magistrate did not err in the exercise of discretion in awarding the interest at 8% per annum from the date of demand ie, 11 July 1998 which was the date of the accrual of a cause of action to the date of judgment when dismissing the defendant's counterclaim.

The interest awarded subsequently from the date of judgment is in line with O. 29 r. 12. There shall be no interest upon interest.

Award Of Costs In Dismission Counterclaim

In Malaysian High Court Practice 1998 Desk Edn. MLJ pp. 333 and 334, it is stated and I agree that a counterclaim is substantially a cross-action which is being tried with the original action, the roles of the parties being reversed. The defendant is treated as the plaintiff and *vice versa.* A counterclaim is indeed a separate cause of action but tried together with the principal claim in order to avoid duplicity or multiplicity of proceedings. A defendant who succeeds in his counterclaim is entitled to costs: *Chell Engineering v. Unit Tool & Engineering Co.* [1950] 1 All ER 378. Conversely, a defendant whose counterclaim is dismissed is liable to pay costs.

Costs are in the discretion of the court and generally follow the event ie, the successful party is entitled to be paid his costs: *Petroliam Nasional Bhd. (Petronas) & Anor. v. Cheah Kam Chiew, supra.*

Conclusion

The answers to the aforesaid three questions are in the affirmative. The decision of the court below is upheld. I therefore hold that this appeal fails and is hereby dismissed with costs.